

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty Order of  
Builders Commonwealth, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman upon an appeal by Builders Commonwealth, Inc. (Builders Commonwealth) from an Administrative Penalty Order directing it to remit a fine of \$2,535. An evidentiary hearing was held on March 11, 2010. Following the receipt of post-hearing submissions on March 19 and 26, 2010, the hearing record closed.

Beverly Connerton, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (the Agency). Arno S. Kahn, appeared on behalf of Builders Commonwealth, Inc.<sup>1</sup>

**STATEMENT OF THE ISSUE**

Whether the \$2,535 penalty imposed upon Builders Commonwealth should be affirmed or modified?

The Administrative Law Judge respectfully recommends that the Commissioner affirm the Administrative Penalty Order issued to Builders Commonwealth, Inc.

Based upon the record in this matter, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Builders Commonwealth is a cooperative in Duluth, Minnesota, and is in the business of providing general construction and architecture services as well as cabinet manufacturing. It has been making cabinets at its current location since 1987.<sup>2</sup>

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<sup>1</sup> Minn. R. 1400.8604, subp. 4 (2007).

<sup>2</sup> Testimony of Arno Kahn.

2. Because it uses toxic substances – particularly commercially-available paints, stains and solvents – as part of its manufacturing operations, Builders Commonwealth has been a licensed hazardous waste generator since 1987.<sup>3</sup>

3. Builders Commonwealth is classified by the Agency as a Very Small Quantity Generator of hazardous waste.<sup>4</sup>

4. Listed on the annual application forms to obtain licensure as a hazardous waste generator the agency details how applicants may obtain information on best hazardous waste disposal practices.<sup>5</sup>

5. In early 2002, the Agency responded to a request from Builders Commonwealth for information on best practices by sending it one or more “Factsheets” the agency had prepared.<sup>6</sup>

6. Further, in October of 2008, the Agency sent Builders Commonwealth a notice regarding a training workshop for local hazardous waste generators.<sup>7</sup>

7. As part of its staining and finishing processes, employees of Builders Commonwealth will apply commercially-available solvents to rags. After use, the rags containing these compounds are placed into a fifty-five gallon drum that had been partially-filled with water. Builders Commonwealth undertook the practice of soaking the rags that had solvents on them in water so as to reduce (if not eliminate) the risk of spontaneous combustion. The solvents used by Builders Commonwealth are also highly-flammable.<sup>8</sup>

8. The solvents used by Builders Commonwealth contain trichloroethylene (TCE).<sup>9</sup>

9. TCE is a carcinogen and a hazardous substance. If introduced into the groundwater, even a small amount of TCE can contaminate a source of drinking water.<sup>10</sup>

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<sup>3</sup> See, Exhibit 11; Testimony of Kit Grayson; Test. of A. Kahn.

<sup>4</sup> Ex. 1; Test. of K. Grayson.

<sup>5</sup> See, Exhibit 11; Test. of K. Grayson.

<sup>6</sup> *Id.*

<sup>7</sup> See, Exhibit 14; Test. of K. Grayson.

<sup>8</sup> See, Exs. C and 12; Testimony of Steven Granmo; Test. of K. Grayson.

<sup>9</sup> See, Ex. 6 and Test. of K. Grayson.

<sup>10</sup> See, Ex. 12 and Test. of K. Grayson.

10. As part of its regular inspection program, Kit Grayson, an Inspector with the Agency's Duluth Office, undertook an unannounced inspection of the Builders Commonwealth facility on February 25, 2009.<sup>11</sup>

11. During this impromptu inspection, Mr. Grayson documented a number of concerns regarding Builders Commonwealth's hazardous waste practices. Specifically, Mr. Grayson noted that Builders Commonwealth:

- (a) did not have records documenting that it had evaluated its paint booth filters;
- (b) did not have records documenting that it had evaluated the rags containing the stains and solvents;
- (c) disposed of used rags that contained residual amounts of TCE into the ordinary waste stream;
- (d) poured the water in which the rags had been soaking on to the open ground behind the Builders Commonwealth facility; and,
- (e) had been undertaking this same set of practices for a period of two years.<sup>12</sup>

12. A chemical analysis of the water in which the used rags were soaking revealed that, because of its toxicity, the waste water was properly categorized as hazardous. The waste water included levels of TCE that were nearly twice the approved waste limit for this compound.<sup>13</sup>

13. Builders Commonwealth does not dispute that it failed to evaluate its paint booth filters.<sup>14</sup>

14. Builders Commonwealth does not dispute that it failed to evaluate the rags that had been used to finish its cabinets.<sup>15</sup>

15. Builders Commonwealth asserts that officials of the Western Lake Superior Sanitary District (WLSSD) had evaluated the stain and thinner contaminated

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<sup>11</sup> Ex. 2; Test. of K. Grayson.

<sup>12</sup> Exs. 2 and 3; Test. of K. Grayson; *compare also* Test. of S. Granmo.

<sup>13</sup> Ex. 6 and Test. of K. Grayson.

<sup>14</sup> See, Exs. 3 and 5; Test. of S. Granmo.

<sup>15</sup> See, Ex. 1, at 2-3; *see also*, Ex. 5.

bags in the past and determined these items to be non-hazardous waste.<sup>16</sup> However, there is not evidence from the WLSSD of this determination in the hearing record.

16. Following his inspection, Mr. Grayson submitted a report of the inspection and the suspected violations to an April 23, 2009 meeting of “the Forum.” The Forum is a management collaborative within the MPCA that reviews claimed violations of state environmental laws and assists local branch offices in determining what, if any, penalties to assess through an Administrative Penalty Order.<sup>17</sup>

17. In Mr. Grayson’s report and recommendation to the Forum he:

- (a) Concluded that Builders Commonwealth committed two violations of state environmental laws – namely, the failure to evaluate hazardous wastes and improper management of these wastes;
- (b) extrapolated from the Builders Commonwealth estimate that it generated five to seven pounds of rags per month to an estimate that 15 gallons of waste water was disposed of on the ground each year for two years;
- (c) estimated that Builders Commonwealth avoided approximately \$60 in hazardous waste disposal costs by improperly disposing of the used rags and wastewater;
- (d) concluded that there was a moderate potential for harm because of Builders Commonwealth’s improper disposal of these items;
- (e) concluded that Builders Commonwealth either knew, or should have known, of the proper disposal practices;
- (f) asserted that a base penalty of \$2,250 was an appropriate sanction for the moderate potential for harm arising out of Builders Commonwealth’s “deviation from compliance;”
- (g) asserted that an upward adjustment from the base penalty of \$225 was an appropriate sanction for Builders Commonwealth’s culpability.<sup>18</sup>

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<sup>16</sup> Test. of A. Kahn.

<sup>17</sup> See, Exs. 7, 8 and 9; Test of K. Grayson.

<sup>18</sup> See, Exs. 1, 3, 5, 7, 8, 9 and B; *compare also*, Minn. Stat. § 116.072, subd. 2 (b).

18. The Forum concurred with Mr. Grayson's assessment and further determined that because of the nature of the violations, the administrative penalty should be non-forgivable.<sup>19</sup>

19. The Forum determined that an administrative penalty in the amount of \$2,535 was appropriate.<sup>20</sup>

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. Minnesota law grants the Administrative Law Judge authority to conduct this proceeding, to consider the matters presented and to make findings, conclusions and recommendations to the Commissioner.<sup>21</sup>

2. The Agency gave Builders Commonwealth proper and timely notice of the hearing and it fulfilled all procedural requirements of law and rule. This matter is properly before the Administrative Law Judge.

3. The rules applicable to expedited reviews of administrative penalty orders provide that the party proposing that an action be taken has the burden of supporting the proposed action by a preponderance of the evidence.<sup>22</sup>

4. Minn. R. 7045.0214 requires a generator of a waste to evaluate the waste within 60 days of generation to determine if the waste is hazardous.

5. Builders Commonwealth does not dispute that it violated Minn. R. 7045.0214 by failing to evaluate its contaminated rags.

6. Minn. R. 7045.0294, subd. 3 requires the generator of the waste to keep records of its waste evaluations.

7. Builders Commonwealth does not dispute that it violated Minn. R. 7045.0294, subd. 3 by failing to maintain records of required evaluations.

8. Minn. R. 7060.0600, subp. 2 prohibits the discharge of industrial waste "to the unsaturated zone or deposited in such place, manner, or quantity that the effluent or residue therefrom, upon reaching the water table, may actually or potentially preclude or

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<sup>19</sup> Ex. 10 and Test. of K. Grayson.

<sup>20</sup> *Id.*

<sup>21</sup> Minn. Stat. §§ 14.50, 116.072 and 116.073 (2008).

<sup>22</sup> Minn. R. 1400.8608 (2007).

limit the use of the underground waters as a potable water supply, nor shall any such discharge or deposit be allowed which may pollute the underground waters.”

9. Builders Commonwealth does not dispute that it violated Minn. R. 7060.0600, subp. 2 by pouring the water in which contaminated rags had been soaking on to the open ground behind the Builders Commonwealth facility.

10. Minnesota Statutes § 116.072, subdivision 1, grants the Commissioner the authority to issue Administrative Penalty Orders for violations of the provisions of Minnesota Statutes Chapter 116 and “any rules adopted under” that chapter.

11. Minnesota Statutes § 116.072, subdivision 6, grants persons to whom the Commissioner has issued administrative penalty orders the right to an expedited administrative hearing to review whether or not the order has been issued in conformity with Minnesota law.

12. Based upon the concessions of Builders Commonwealth, and the Agency’s interest in deterring future noncompliance, the penalty amounts in the Administrative Penalty Order are appropriate.

13. The calculation of the penalty amounts was reasonable and consistent with the Agency’s determinations in similar cases.

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge recommends that the Commissioner AFFIRM the Administrative Penalty Order issued to Builders Commonwealth, Inc.

Dated: April 26, 2010

/s/ Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

## **NOTICE**

This Report is only a recommendation to the Commissioner of the Minnesota Pollution Control Agency and is not a final decision. The Commissioner will make his final decision after reviewing this report and the hearing record. In making that decision the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation that appear in this report.

The Commissioner may not make his final decision until at least five days after the receipt of this Report. During that time the Commissioner must give the person or persons to whom the order was issued an opportunity to comment on the Report. Parties should contact the office of Paul Eger, Commissioner of the Minnesota Pollution Control Agency, 520 Lafayette Road North, St. Paul, Minnesota 55155, to find out how to file comments.

The record of this contested case proceeding closes upon the filing of comments on the report with the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

## MEMORANDUM

As noted above, Builders Commonwealth does not dispute the fact that it was out of compliance with the record-keeping provisions of applicable regulations and the required waste disposal practices. Instead, it urges the Commissioner to reduce or eliminate the penalties imposed by the agency in the Administrative Penalty Order. Builders Commonwealth argues that the penalty amounts could be better routed toward education and training, and more broadly, that the agency should have a different approach when enforcing the regulations against Very Small Quantity Generators.

For the purpose of this case, it suffices to say that the decisions relied upon by Builders Commonwealth when arguing that the amount and severity of the penalty is too great, do not oblige that conclusion.<sup>23</sup> In the view of the Administrative Law Judge, the method that the agency used to calculate the penalty, and the overall amount sought, is consistent with the agency's authority and practice in similar cases.

With that said, however, the questions of whether to impose a penalty of this amount, or whether a different arrangement is in the best interest of the state, are matters that are entirely committed to the Commissioner for his consideration and review.

E. L. L.

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<sup>23</sup> See, *Arrowhead Concrete Works, Inc. v. Williams*, 550 N.W.2d 883 (Minn. App. 1996); *In the Matter of the Administrative Penalty Order Issued to Elgin Milk Service, Inc.*, OAH Docket No. 61-2200-18099-2 (2007) (<http://www.oah.state.mn.us/aljBase/220018099.rt.htm>); *In the Matter of the Administrative Penalty Order Issued to Building Systems Corporation*, OAH Docket No. 58-2200-17673-2 (2007) (<http://www.oah.state.mn.us/aljBase/220017673%20report.htm>); *In the Matter of the Administrative Penalty Order Issued to Paul S. Dougherty, III, for MCM Industries, Inc.*, OAH Docket No. 6-2200-5252-2 (1991) (<http://www.oah.state.mn.us/aljBase/22005252.91.htm>); *In the Matter of the Administrative Penalty Order to Palm Industries, Inc.*, OAH Docket No. 2-2200-5080-2 (1990) (<http://www.oah.state.mn.us/aljBase/22005080.90.htm>).